Chase Perdana Bhd v Md Afendi bin Hamdan

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO S-02–1263 OF 2005
GOPAL SRI RAM, TENGKU BAHARUDIN SHAH AND SULAIMAN DAUD JJCA
27 FEBRUARY 2008

Contract — Contingent contract — Dependent upon obtaining approvals from relevant authorities — Approval from Foreign Investment Committee ('FIC') — Whether appellant had by its conduct waived requirement of FIC's approval — Whether appellant estopped by its conduct from relying on approval as a condition precedent — Effect of either necessitating or excusing performance of promise

The appellant by a letter of undertaking agreed with the respondent to pay a sum of RM5m for the respondent's shares in a company known as Jernih Kaya Sdn Bhd ('Jernih Kaya'). There was no dispute that the appellant paid the deposit sum of RM1m for the said purchase. It was the term of the said letter that the balance sum of RM4m would be paid upon the approval of the transaction by the Foreign Investment Committee ('FIC'). The appellant subsequently entered into a sale and purchase agreement with another person to purchase 900 shares (which included the respondent's shareholding) in Jernih Kaya and made a public statement announcing its acquisition of a controlling stake in Jernih Kaya. The FIC however refused to give its approval for the proposed acquisition by the appellant. The appellant contended that it was entitled to have the deposit returned to it as the condition precedent in the agreement, namely the FIC's approval had not been obtained. The respondent in reply contended that the appellant had, by its conduct, waived the requirement of the FIC's approval and was in any event estopped by its conduct from relying on the said approval as a condition precedent. The learned judge found for the respondent and hence this appeal.

Held, dismissing the appeal with costs:

(1) It is a principle of general application that if an obligation in a contract is conditional on an occurrence of an event then the occurrence or non-occurrence of the event will have the effect of either necessitating or excusing the performance of the promise. As in the case of all general principles, this instant case was also subject to qualification (see paras 5 & 8).

(2) If parties to a contract which is subject to a contingent condition conduct themselves towards each other in such a way as to show that the condition does not matter, then, neither can at a later stage seek to rely or insist upon such condition. This was the basis upon which the learned judge decided this case. The learned judge, having come to the conclusion that the appellant and the respondent had conducted themselves in such a way as to disregard the requirement of FIC's approval, was entitled to find for the respondent (see para 8).

(3) Where so much turns on the credibility of the witnesses in relation to their conduct in relevant circumstances, it is the duty of the court to defer to the views formed by the primary trier of the fact. The learned judge having had the audio visual advantage was entitled to have his findings undisturbed unless it could be clearly demonstrated that he was plainly wrong. On the facts, the appellant had failed to discharge this burden (see para 9).

[Bahasa Malaysia summary

Perayu melalui surat aku janji berjanji dengan responden untuk membayar sejumlah RM5j untuk saham-saham responden di dalam syarikat yang dikenali sebagai Jernih Kaya Sdn Bhd ('Jernih Kaya'). Tidak terdapat pertikaian bahawa perayu membayar wang deposit sejumlah RM1j untuk pembelian tersebut. Adalah terma surat tersebut bahawa baki jumlah sebanyak RM4j akan dibayar sebaik saja mendapat kebenaran transaksi daripada Jawatankuasa Pelaburan Asing ('FIC'). Perayu kemudiannya memasuki perjanjian jual beli dengan seorang yang lain untuk membeli 900 saham (termasuk pemegangan responden) di dalam Jernih Kaya dan kemudiannya membuat pernyataan umum mengumumkan pengambilannya terhadap kepentingan di dalam Jernih Kaya. Walau bagaimanapun, FIC enggan memberi kebenarannya untuk pengambilan yang dicadangkan oleh perayu. Perayu berhujah bahawa ia berhak untuk mengembalikan semula deposit kerana syarat terdahulu di dalam perjanjian, iaitu kebenaran FIC tidak diperoleh. Responden di dalam menjawab berhujah bahawa perayu telah, melalui tindakannya, mengetepikan keperluan terhadap kebenaran FIC dan walau bagaimanapun diestop melalui tindakannya daripada bergantung ke atas kebenaran tersebut sebagai syarat terdahulu. Hakim yang bijaksana memihak kepada responden dan maka rayuan ini.

Diputuskan, menolak rayuan dengan kos:

(1) Ia adalah prinsip penggunaan am bahawa jika tanggungjawab di dalam kontrak adalah bersyarat atas berlaku kejadian oleh itu berlaku atau tidak berlaku kejadian tersebut akan mempunyai kesan sama ada

memerlukan atau menolak pelaksanaan perjanjian tersebut. Seperti dalam prinsip-prinsip am, kes ini juga tertakluk kepada kelayakan (lihat perenggan 5 & 8).

(2) Jika pihak-pihak kepada kontrak yang tertakluk kepada syarat kebergantungan bertindak dalam cara seperti untuk menunjukkan bahawa syarat tersebut tidak penting, oleh itu, kedua-duanya tidak boleh pada peringkat kemudiannya meminta untuk bergantung atau mendesak ke atas syarat tersebut. Ini adalah asas di mana hakim yang bijaksana menentukan kes ini. Hakim yang bijaksana dengan mencapai kesimpulan bahawa perayu dan responden telah bertindak dengan cara tidak mempedulikan keperluan kebenaran FIC, berhak untuk memihak kepada responden (lihat perenggan 8).

(3) Di mana kredibiliti saksi-saksi sering bertukar berkaitan dengan tindakan mereka di dalam keadaan yang relevan, ia adalah kewajipan mahkamah ini untuk merujuk kepada pandangan yang dibentuk oleh pengadil fakta utama. Hakim yang bijaksana setelah mempunyai kelebihan pandang dengar berhak untuk dapatannya tidak diganggu kecuali ia dapat ditunjukkan secara jelas bahawa beliau jelas salah. Atas fakta, perayu telah gagal untuk melepaskan beban ini (lihat perenggan 9).]

Notes

For cases on contigent contract dependent upon obtaining approvals from relevant authorities, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 3200–3201.

Cases referred to

Aberfoyle Plantations Ltd v Khaw Bian Cheng [1960] MLJ 47 (folld)
National Land Finance Co-operative Society Ltd v Sharidal Sdn Bhd [1983] 2 MLJ 211 (refd)

Appeal from: Suit No K22–126 of 1998 (High Court, Kota Kinabalu)

Francis Wong (William Liaw, Chan & Co) for the appellant.
Jeyan Marimuttu (Marimuttu & Partners) for the respondent.

Gopal Sri Ram JCA (delivering judgment of the court):

[1] This is the judgment of the court.

[2] This appeal is directed against the judgment of the High Court at Kota Kinabalu dismissing the appellant's claim for the recovery of RM1,000,000 paid by it as deposit for purchase of shares from the respondent and against the judgment entered in the defendant's favour on his counterclaim. The brief facts relevant to this appeal are as follows.

[3] By a letter of undertaking dated 24 June 1997 the appellant agreed with the respondent to pay a sum of RM5,000,000 for the respondent's shares in a company known as Jernih Kaya Sdn Bhd. The letter of undertaking contained a term that the balance sum of RM4,000,000 would be paid upon approval of the transaction by the Foreign Investment Committee ('FIC') and other relevant authorities. There is no dispute that the appellant paid the sum of RM1,000,000. Nor is there any dispute that the respondent handed over the shares in question with the transfer forms to the appellant. By a sale and purchase agreement dated 26 June 1997, the appellant entered into an agreement with Madrigal B Gumba to purchase 900 shares (which included the respondent's shareholding) in Jernih Kaya Sdn Bhd. Shortly after these events, the appellant made a public statement announcing its acquisition of a controlling stake in Jernih Kaya Sdn Bhd. In consequence of this announcement the appellant's shares rose in value. Later, by a letter dated 12 January 1998 the FIC refused to give its approval for the proposed acquisition by the appellant.

[4] The appellant's case in the court below and before us is that it is entitled to have the deposit returned to it because the condition precedent in the agreement, namely, the FIC approval had not been obtained. The respondent, on the other hand, contended that the appellant had by its conduct waived the requirement of the FIC approval and is in any event estopped by its conduct from relying on the said approval as a condition precedent. The learned judge found for the respondent. He was no doubt impressed by the appellant's conduct both before and after the letter of undertaking was executed.

[5] It is a principle of general application that if an obligation in a contract is conditional on an occurrence of an event then the occurrence or non-occurrence of the event will have the effect of either necessitating or excusing the performance of the promise. So if *A* agrees with *B* that he will pay *B* if *X* approves the transaction and if *X* does approve the transaction *A* must pay *B*. If *X* does not approve the transaction then he need not.

[6] The leading authority on the subject is *Aberfoyle Plantations Ltd v Khaw Bian Cheng* [1960] MLJ 47. In that case, the appellant agreed to sell an estate to the respondent. However, the sale was conditional upon the appellant obtaining a renewal of certain leases. The respondent paid the deposit

required to be paid under the agreement. As it happened the appellant did not obtain the renewal of the leases in question. The respondent sued to recover the deposit. It was held by the Privy Council that the respondent was entitled to its deposit. On a proper construction of the contract in that case, the respondent's obligation to pay the balance of the purchase price did not arise if the appellant did not obtain the renewal of the leases.

[7] Similarly, in *National Land Finance Co-operative Society Ltd v Sharidal Sdn Bhd* [1983] 2 MLJ 211 the respondent in that case had agreed to sell to the appellant certain lands. It was a condition of the sale and purchase agreement that the approval of the Foreign Investment Committee should be obtained. As it happened, such approval was refused. It was held that the sale and purchase had become void because the approval by the Foreign Investment Committee was a contingent condition.

[8] As in the case of all general principles, the one under discussion is also subject to qualifications. If parties to a contract which is subject to a contingent condition (which is the case in the present appeal) conduct themselves towards each other in such a way as to show that the condition is not to matter, then, neither can at a later stage seek to rely or insist upon such condition. This is the basis upon which the learned judge decided this case. He was, as we have earlier said, much impressed by the appellant's conduct in relation to the Foreign Investment Committee requirement. Having come to the conclusion that the appellant and the respondent had conducted themselves in such a way as to disregard the requirement of the Foreign Investment Committee's approval, the learned judge was entitled to find for the respondent on the counterclaim and against the appellant on its claim.

[9] In a case of this nature where so much turns on the credibility of the witnesses in relation to their conduct in relevant circumstances it is the duty of this court to defer to the views formed by the primary trier of fact. The learned judge in the instant case having had the audio visual advantage, which we in this court plainly lack, he is entitled to have his findings undisturbed unless it can be clearly demonstrated that he was plainly wrong. In our judgment the appellant has failed to discharge this burden in the appeal before us.

[10] For the reasons already given, this appeal is dismissed. The orders of the High Court are affirmed. The appellant must pay the respondent the costs of this appeal. The deposit to be paid to the respondent to account of

his taxed costs. The judgment sum deposited in court pursuant to the order of this court dated 13 March 2006 is hereby directed to be paid out to the respondent.

Appeal dismissed with costs.

Reported by Kartini Dalina Md Daud